

No. 12,145

IN THE

United States Court of Appeals

For the Ninth Circuit

W. M. (alias Bill) GILLIS,
(Plaintiff) Appellant,

vs.

BEN F. GILLETTE and IRENE GILLETTE,
(Defendants) Appellees.

BRIEF FOR APPELLEES.

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QUESTIONS INVOLVED.

1. Does the abandonment of a contract by a contractor,
 - (a) constitute a bar to his enforcement of a lien for work performed, and
 - (b) prevent him from obtaining any of the benefits of the lien statutes?

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BRIEF FOR APPELLEES.

May it please the Court:

Appellant appeals from the trial court judgment rendered in an action to foreclose a lien on property situate in Nome, Alaska. (Tr. 26.) The court, in its judgment, gave plaintiff (appellant) judgment in the sum of five hundred twenty-six and 08/100 dollars, and gave defendants (appellees herein) judgment in the sum of eight hundred seventeen and 25/100 dollars. Plaintiff was denied the right to foreclosure on the alleged contractor's lien. (Tr. 24.)

QUESTION ON APPEAL.

Appellant urges that from the record and findings of fact it is required that conclusions of law and judgment should be for plaintiff (appellant). He asserts that there is no basis in the record, at any point, for denying him judgment for his labor bill. The question is: Does an abandonment of a contract by a contractor constitute a bar to his enforcement of a lien for work performed, and prevent him from obtaining any of the benefits of the lien statutes?

FACTS.

Plaintiff, appellant herein, contracted with the defendants, appellees, to pour a concrete basement and move defendant's house from one lot to another. The contract provided that work was to be completed in October, 1946, at a cost of \$2,872.28. Defendants paid plaintiff \$1,000.00 on account. Plaintiff did not complete the moving of the house in the month of October, but continued thereon from time to time until December 15, 1946, at which time he abandoned the work. (Tr. 20, 21.) On the 14th day of March, 1947, plaintiff filed a claim of lien for the sum of \$2,746.83, less the \$1,000.00 advanced by defendants, in the office of the recorder of the Cape Nome Precinct, Second Division, Territory of Alaska. (Tr. 21.)

Under the contract, which plaintiff abandoned, all materials were to be furnished by defendants. (Tr. 21.) In the moving operations, plaintiff furnished ma-

terials to the value of \$526.08. For this material, plaintiff recovered judgment. (Tr. 23, 25.)

On the 13th day of September, 1947, the plaintiff filed his complaint (Tr. 2) wherein he demanded judgment against the defendants in the sum of \$1,746.83 for the reasonable value of labor and materials, with interest at 6% per annum from December 16, 1946; for \$1.95, cost of filing lien; for a reasonable attorney's fee; and costs of suit; and that the premises be sold under a decree of the trial court.

Defendants' answer and cross-complaint alleged that an agreement was entered into by plaintiff and defendants, and that plaintiff was guilty of breaching the contract, and further that in the latter part of January, 1947, plaintiff advised the defendants that he was going to do nothing further in connection with the moving of the residence of defendants, or the completion of the concrete basement therefor.

Appellant's reply was filed on December 11, 1947, the cause was tried before the court without a jury on the 26th day of December, 1947. The trial court on the 27th day of August, 1948, made its findings of fact and found that a contract existed between the parties and that the plaintiff had abandoned the work. (Tr. 21.) In its conclusions of law and judgment (Tr. 25), plaintiff was given judgment against defendants for \$526.08, and defendants were given judgment against plaintiff in the sum of \$817.25. The net recovery for defendants was \$291.17. (Tr. 26.)

ARGUMENT.

Each of the appellant's points in his brief is predicated upon the assumption that he is entitled to the benefits of the lien statutes despite his abandonment of the contract. Since we claim that this assumption is erroneous, we will here dispose of all of his points under a single heading.

I.

ABANDONMENT OF A CONTRACT BY A CONTRACTOR CONSTITUTES A BAR TO HIS ENFORCEMENT OF A LIEN FOR WORK PERFORMED.

There appears to be no Alaska case directly in point. The Alaska lien law, as appellant admits (App. Br. p. 10), was adopted from the Oregon law. (*Carter's Annotated Alaska Codes*, "Introduction" and note to Sec. 262, p. 409; also *Kohn v. McKinnon*, 90 F. 623.) The Oregon court had the identical question presented to it in several cases.

We propose now to examine into the Oregon court's disposition of the question; but before so doing we digress momentarily to observe a legal definition of the word, "abandonment".

Abandonment is a composite fact, one element visible and the other sounding in intention or motive. It is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect. The two elements must conjoin and operate together or there can be no abandonment. (*Pocoke v. Peterson*, 165 S.W. 1017, 1021, 256 Mo. 501.)

Under the Oregon law one may not recover the reasonable value of his services for another on a special contract, if there has been a failure to comply with the contract, and there has been a wilful or voluntary abandonment.

In *Pippy v. Winslow*, 62 Oregon 219, 222; 125 Pac. 298, 299 (1912), the court said:

“Where the contractor fails to perform a considerable part of the work required by the contract, his failure, irrespective of whether his intention were good or bad, constitutes a bar to his enforcement of a lien for the work performed. If defects show that the contractor performed the work in a slovenly and improper manner, not conforming substantially with the plans and specifications and thereby defeating the intentions of the parties to have the work done in a particular manner, the contractor, unless there has been a waiver, cannot enforce a lien. The wilful omission, though in an unimportant respect, will preclude the assertion of a lien by him. The spirit of the contract should be faithfully observed, though the letter thereof fail. (20 *Am. & Eng. Enc. of Law* (2d ed.) 367; *Glacius v. Black*, 50 NY 145 (10 Amer. Rep. 449); *Anderson v. Peterreit*, 86 Hun. 600 (33 NY Supp. 741); *Perry v. Quackenbush*, 105 Cal. 299 (38 Pac. 740).” *Birkemeier v. Nobel*, 149 Ore. 292 at 308 (40 P. (2d) 694).

Also in *Tribou and McPhee v. Strowbridge*, 7 Ore. 156, the Oregon court, at page 160, said:

“We think the rule in this state is, that where one performs service for another on a special

contract, and for any reason *except a voluntary* abandonment, fails to fully comply with his contract, and such compliance becomes impracticable, and the service has been of value to him for whom it was rendered, he may recover for such service the reasonable value." (Italics ours.)

And in the Oregon case of *Bradfield v. Bollier*, 169 Ore. 425, 128 P. (2d) 942, foreclosure of a mechanic's lien, and abandonment of a contract, at page 432, the Oregon court said:

"The instant case is one in which the original contractor abandoned construction and whether he would be entitled to a lien or any other affirmative relief would depend upon whether the abandonment occurred under such circumstances as to come within the exception to the general rule that a *wilful* abandonment is a bar to any recovery. (*Tribou v. Strowbridge*, 7 Ore. 156; *Steeple v. Newton*, 7 Ore. 110, 33 Amer. Rep. 705; *Todd v. Huntington*, 13 Ore. 9, 4 P. 295; *Move v. Island City M. & M. Co.*, 19 Or. 363, 24 P. 521; *Murray's Estate*, 56 Or. 132, 107 P. 19; *West v. McDonald*, 64 Or. 203, 127 P. 784, 128 P. 818; *Wuchter v. Fitzgerald*, 83 Or. 672, 163 P. 819; *Easton v. Quackenbush*, 86 Or. 374, 168 P. 631; *Espenhain v. Barker* (*Phillips v. Barker*), 121 Or. 621, 256 P. 766; *Rose v. U. S. Lumber & Box Co.*, 108 Or. 237, 215 P. 171; *Wolke v. Schmidt*, 112 Or. 99, 228 P. 921; *State v. U. S. Fidelity Co.*, 144 Or. 535, 24 P. 2d 1037." (Italics ours.)

It thus appears that the findings of fact, in view of the one on abandonment, not only support the conclusions of law, as set forth by the trial court, but

also support the judgment of the trial court with respect to appellant's claim for work and labor, in denying any recovery on or off the contract.

Since appellant has not shown himself entitled to a lien, he is barred from receiving the benefits of the statute which give a successful plaintiff his costs of filing the lien, his attorney's fees and his costs.

CONCLUSION.

We have thus shown that when the trial court found in its findings of fact that a contract existed, and that appellant abandoned his contract, it is justified and proper for it to conclude, as a matter of law, that he is not entitled to relief upon the contract or any benefit from the Alaska mechanic's lien statute.

We therefore respectfully submit that no other conclusions of law or judgment could properly result from the findings of fact of the trial court; that the record and findings of fact do not require judgment foreclosing the lien; and that further findings of fact are unnecessary to a complete decision on the question involved. The judgment should therefore be sustained.

Dated, San Francisco, California,
May 13, 1949.

Respectfully submitted,

CHELLIS CARPENTER,

Attorney for Appellees.

